



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:

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In re: WMUI(FM), Rushville, IN
Facility ID No. 174912
File No. BAPED-20091016ABD

**Application for Assignment of
Construction Permit**

Petition to Deny

Dear Mr. Hensley and Counsel:

We have before us the referenced application (the "Application") for Commission consent to the assignment of the construction permit¹ (the "Construction Permit") for new unbuilt Station WMUI(FM), Rushville, Indiana (the "Station"), from The President and Trustees of Miami University of Ohio ("MU" or "Permittee") to Rush County (Indiana) Schools ("Rush County"). We also have before us an undated letter from Martin L. Hensley ("Hensley") opposing grant of the Application,² received by the Commission on November 4, 2009 (the "November Objection"), and a December 7, 2009, "Petition to Deny" the Application,³ also filed by Hensley (the "December Objection"). For the reasons stated below, we dismiss Hensley's pleadings as petitions to deny, deny the pleadings as informal objections, and grant the Application.

¹ File No. BNPED-20071019ALB.

² On November 19, 2009, MU and Rush County filed a Consolidated Opposition to Hensley's November 4, 2009, pleading ("November Opposition").

³ On December 7, 2009, MU and Rush County filed a Consolidated Opposition to Hensley's December 7, 2009, pleading ("December Opposition").

Background. In the two Objections, Hensley argues that the Application should be denied because the Permittee had, and has, “no interest” in constructing the facility⁴ and that proposed buyer Rush County is constructing the facility prior to Commission grant of the Application; Hensley claims that this amounts to an unauthorized transfer of control of the Station. Hensley also contends that the Permittee and Rush County made misrepresentations, claiming that there is a discrepancy in the actual date Rush County reached agreement with the Permittee to purchase the Station.⁵ In addition, Hensley contends Rush County has been unwilling to allow him to see its public file since August 2009 when Rush County announced that it was purchasing the Construction Permit.⁶

In the November Opposition, MU and Rush County (collectively, the “Respondents”) argue that Hensley’s November Objection does not meet the requirements of Section 309 of the Communications Act of 1934, as amended (the “Act”)⁷ for a petition to deny and must be dismissed. In the December Opposition, Respondents argue that Rush County merely took routine and necessary planning steps to ascertain the actions that would be needed to construct the Station, and that this does not amount to improper premature construction. With regard to Hensley’s other claims, Respondents argue that they are without merit.

Discussion. Procedural Issue. Hensley's November Objection is procedurally defective as a petition to deny. Hensley failed to provide an affidavit to support his factual allegations, as required by Section 309(d)(1) of the Act. Additionally, Hensley failed to properly serve this pleading on the Respondents or their counsel, as required by Section 309(d)(1) of the Act and Section 1.47 of the Commission's Rules (the “Rules”).⁸ Hensley attempted to correct these defects in his December Objection, but that pleading was not filed within the 30-day period for filing petitions to deny established by the *Public Notice* announcing the acceptance of the Application.⁹ Accordingly, we will dismiss Hensley's pleadings as petitions to deny. We will, however, treat the pleadings as informal objections pursuant to Section 73.3587 of the Rules.¹⁰

⁴ November Objection at 1; December Objection at 2-3. For example, Hensley claims that he “has been in contact with various WMUI staff who have indicated that the facility would never be built by WMUI” See December Objection at 2.

⁵ Hensley argues that MU announced the sale of the Station in August of 2009, but did not submit the Application until October 16, 2009 (The Construction Permit Purchase Agreement (the “Purchase Agreement”) submitted with the Application was signed by Rush County on September 30, 2009, and by MU on October 8, 2009. See Application, Attachment 4, Purchase Agreement at pp. 6-7.). Hensley submits a reprint from an August 6, 2009, article in the *Rushville (Indiana) Republican* reporting that Rush County representatives stated that MU was “willing to sell [WMUI(FM)] to [Rush County] for \$2,000.” December Objection at Exhibit 3, p.2. The article reports that Rush County principals met with the local school board and were authorized to “proceed with all dispatch with respect to continuing their efforts to secure the license and get the station on the air.” December Objection, Exhibit 3, p.2. Hensley argues that this language indicates that Rush County had taken control of WMUI(FM) in August of 2009, before the Application was filed or granted.

⁶ Finally, Hensley alleges that MU and Rush County are “cooperatively participating in a consolidated response” to Hensley’s pleadings, but it is clear that Rush County is financing the legal response.” December Objection at 3. Hensley provides no support for this claim, and it will not be considered further.

⁷ 47 U.S.C. § 309.

⁸ 47 C.F.R. § 1.47.

⁹ See *Broadcast Applications*, Public Notice, Report No. 27095 (rel. Oct. 21, 2009).

¹⁰ 47 C.F.R. § 73.3587.

Substantive Issues. Pursuant to Section 309(e) of the Act, informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹¹ Given the speculative nature of Hensley’s unsupported allegations, we find that Hensley’s Objections do not carry that burden.

Premature Construction. Construction of a new broadcast station without first obtaining a construction permit is prohibited by Section 319(a) of the Act.¹² Prospective permittees may undertake certain preliminary construction activities, provided they have no intrinsic radio communications use related to a proposed facility.¹³ These include site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, equipment purchases, and on-site storage of equipment.¹⁴ Other actions, such as installation of an antenna, transmitter, transmission line, and related inside wiring linking these facilities together, constitute prohibited premature construction steps.¹⁵

In the two Objections, Hensley argues that Rush County has begun building the facility.¹⁶ Hensley submits as evidence an alleged “June 2009” e-mail from Eddie Small, Jr., Rush County’s Director of Broadcasting, to an unidentified broadcast engineer seeking station construction and siting information.¹⁷ Hensley also submits an alleged June 24, 2009, e-mail purporting to contain an engineering study for a new “Rush Consolidated Schools” transmitter site.¹⁸

In their December Opposition, Respondents argue that the information Hensley “has provided simply demonstrates that RCS [Rush County] took steps to ascertain what would ultimately be needed to construct the [S]tation and possibly move the [S]tation’s transmitter site.”¹⁹ Respondents add that these routine and necessary planning steps comply with the financial qualification ascertainment requirements of the Application.²⁰ Finally, Respondents assert that Rush County did not order any transmission or

¹¹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n. 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested) (“*Area Christian*”).

¹² 47 U.S.C. § 319.

¹³ See *IT&E Overseas, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 3774, n.8 (1989) (“*Overseas*”).

¹⁴ See *Wendell & Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1680 (1998) (applicants may take construction steps generally having no intrinsic radio communications use, such as site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors) (“*Wendell*”); *Christian Broadcasting of Midlands, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 6404 (1987); *Overseas*, 4 FCC Rcd 3774 (1989); and *Patton Communications Corporation*, Declaratory Ruling, 81 FCC 2d 336 (1980).

¹⁵ See *California State University, Sacramento*, Report and Order, 13 FCC Rcd 17960 (1998) (premature construction found where work included installation of antenna, transmitter, transmission line and related inside wiring linking such facilities).

¹⁶ November Objection and December Objection at 4.

¹⁷ December Objection at Exhibit 1.

¹⁸ *Id.* at Exhibit 2.

¹⁹ December Opposition at 2.

²⁰ See, e.g., FCC Form 314, Section III, Question 10.

production equipment, nor did Rush County commence any Station construction.²¹ Because Hensley has failed to proffer any probative evidence that Rush County has engaged in any impermissible construction activity, we find that he has failed to establish a substantial and material question of fact regarding this allegation.

Other Matters. With respect to Hensley's unsupported charge that MU never intended to construct the Station, Respondents provide a declaration made under penalty of perjury by an MU administration official stating that if it were not for "difficult budgetary issues," MU fully intended to construct the Station.²² This is sufficient to rebut Hensley's uncorroborated assertion.²³ Additionally, although Rush County, as proposed assignee of the Station, need not maintain a public inspection file for the Station pursuant to Section 73.3527 of the Rules,²⁴ Rush County indicates that the Application and associated materials have been available for viewing at an address in Rushville, Indiana, in accordance with notice published in the local newspaper, pursuant to the Rules.²⁵

Finally, with respect to Hensley's claim – based on an August 6, 2009, newspaper article in the *Rushville (Indiana) Republican*²⁶ -- that there is a discrepancy in the date on which MU and Rush County entered into an agreement for the assignment of the Construction Permit, we reject Hensley's discrepancy claim because the newspaper article recounts only that Rush County representatives indicated that MU had "agreed to sell" the Station to Rush County, not that a contract for such sale had been signed. The article therefore is not indicative of any discrepancy regarding the date of the agreement for the assignment of the Station, and it is not at all indicative that Rush County had prematurely assumed control of the Station. The fact that the Respondents' Purchase Agreement was not finalized and executed until October 8, 2009, is consistent with the facts as stated in the article.²⁷ We find that Hensley's arguments on these matters are meritless and warrant no further discussion.

Conclusions/Actions. Based on the evidence presented in the record, we find that Hensley has failed to raise a substantial and material question of fact warranting further inquiry regarding grant of the Application. We further find MU is fully qualified to assign, and Rush County is fully qualified to be a permittee to construct the Station, and we find that grant of the Application will further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that the November 4, 2009, and December 7, 2009, Petitions to Deny filed by Martin L. Hensley ARE DISMISSED, and when treated as Informal Objections, ARE DENIED. IT IS FURTHER ORDERED, that the Application (File No. BAPED-20091016ABD) for consent to assign the construction permit of new unbuilt Station WMUI(FM), Rushville, Indiana, from

²¹ December Opposition at 3 (referencing attached declaration made under penalty of perjury by Rush County Schools Superintendent Dr. John E. Williams); *see also* November Opposition at Attachment 2.

²² *See* November Opposition at Attachment 1 (Declaration of David K. Creamer, Vice President for Finance and Business Services at MU).

²³ *See, e.g., Ithaca Community Radio*, Letter, 24 FCC Rcd 363, 364 n.5 (MB 2009) (unsupported allegation adequately rebutted by licensee submission supported by affidavit from licensee board member).

²⁴ 47 C.F.R. § 73.3527.

²⁵ *See id.* at Attachment 2 (Declaration of Dr. John E. Williams, Superintendent of Rush County Schools); *see also* 47 C.F.R. §§ 73.3527 and 73.3580.

²⁶ *See* n.5, *supra*.

²⁷ *See id.*

The President and Trustees of Miami University of Ohio to Rush County Schools, IS GRANTED, subject to the following condition:

This construction permit expires on August 22, 2011. Commission rules which became effective on February 16, 1999, have a bearing on this construction permit. *See Streamlining of Mass Media Applications*, Report and Order, 13 FCC Rcd 23056 (1999). Pursuant to these rules, consummation of the assignment consented to herein will have no effect on the expiration date of the permit. The construction permit will be subject to automatic forfeiture unless construction is complete and an application for license to cover is filed prior to expiration.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Miami University of Ohio
Rush County Schools